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Supreme Court, U.S.
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No. 98-1111

In The

Supreme Court of the United States

STATE OF TEXAS, et al.,

Petitioners,

v.

FRANCOIS DANIEL LESAGE

and

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT LESAGE IN OPPOSITION

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ARGUMENT

Respondent-plaintiff Lesage sued the petitioners-defendants, alleging that The University of Texas at Austin "impermissibly relied on race as a selection criterion by giving preferred status to Black and Hispanic applicants." Pet. App. A2. His "central claim is that he was subjected to unconstitutional racial discrimination by the University's evaluation of his admissions application." Pet. App. A14-A15.

The Fifth Circuit held that "diversity" is not a compelling state interest. Pet. App. A15. For reasons unknown to Lesage, the defendants have not sought review in this Court of that holding, which obviously resolves an important question of law.

The Fifth Circuit further held that "those applicants who had not yet been eliminated from consideration at the time racially preferential criteria were applied have suffered an implied injury" and are entitled to some form of relief, "even if their applications ultimately would not have resulted in admission under a nondiscriminatory admissions regime." Pet. App. A18. The holding is consistent with *Price v. City of Charlotte*, 93 F.3d 1241 (4th Cir 1996), *cert. denied*, 117 S.Ct. 1246 (1997) and the decisions of this Court cited therein. The defendants fail to identify (and Lesage's counsel could not locate) any judicial opinion that criticizes that recent Fourth Circuit decision.

In this case, the Fifth Circuit further held that "given the genuine, material factual dispute as to when the University first used race as a criterion to choose or exclude candidates to the counseling psychology program in relation to the point in time at which Lesage was

denied admission, it was error to grant summary judgment in favor of the state." Pet. App. A16-A17. The Fifth Circuit's opinion, which properly states the controlling rule of law, fully supports that factbound holding.

The defendants assert that the Fifth Circuit's opinion "attempts to dramatically change the landscape in race discrimination cases involving affirmative action" and "creates a lighter burden for non-minority plaintiffs complaining of discrimination than for minority plaintiffs making similar claims." Pet. 6 & 10.

The defendants cite ten judicial opinions in support of the foregoing assertions. Pet. 7-10. All are inapposite. See *Trans World Airlines v. Thurston*, 105 S.Ct. 613, 621-622 (1985) ("the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination"). In this case, Lesage produced direct evidence that a competitor for a governmental benefit was granted a racial preference. Pet. App. A16 ("Dr. Richardson admitted in his deposition that race was used as a factor during the winnowing down of the pool of applicants"). In the ten cited cases, the plaintiffs relied on circumstantial evidence of discrimination.

Absolutely nothing in the Fifth Circuit's opinion indicates that the case of a similarly situated "minority" plaintiff (i.e., one who presents direct evidence that a competitor for a governmental benefit was granted a racial preference) would be decided differently than this case. Cf. *Moore v. U.S. Dep't of Agriculture*, 993 F.2d 1222, 1224 (5th Cir. 1993) ("[t]he badge of inequality and stigmatization conferred by racial discrimination is a cognizable harm in and of itself providing grounds for

standing") and *Finch v. Mississippi State Medical Ass'n*, 585 F.2d 765, 772 (5th Cir. 1978) (upholding, against standing challenge, right of Dr. Britton to serve as representative of class of black doctors; alleged injury was deprivation on racial grounds of his ability to be considered for membership on state board of health).

The defendants further assert that "the Fifth Circuit rewrote the affirmative defense established by this Court in *Mt. Healthy School Dist. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977)." Pet. 6. The assertion is, at a minimum, an overstatement. First, although *Mt. Healthy* clearly held that a plaintiff could not be reinstated where the same discharge decision would have been made, it is not clear that this Court held that the "same decision" defense precluded liability. Second, *Mt. Healthy* involved free speech. Its applicability to claims of racial discrimination brought pursuant to 42 U.S.C. §§ 1981, 1983 and 2000d is therefore unclear.

The Fifth Circuit's approach is consistent with that of the Eight Circuit. See *Edwards v. Jewish Hosp. of St. Louis*, 855 F.2d 1345, 1348 (8th Cir. 1988) (42 U.S.C. § 1981 racial discrimination case; held that "same decision" finding did not preclude liability, "[r]ather, evidence that the employer would have discharged the employee in the absence of discrimination is properly considered in determining the appropriate remedy") and *Bibbs v. Block*, 778 F.2d 1318, 1322 (8th Cir. 1985) (en banc) (Title VII racial discrimination case; held that where race is "discernible" factor in adverse employment decision, liability under the statute is established; "[f]orcing Bibbs to be considered for promotion in a process in which race plays a

discernible part is itself a violation of the law, regardless of the outcome of the process").

The defendants improperly cite *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989) in support of their assertion that "[t]his Court has consistently reaffirmed the basic *Mt. Healthy* test that defendants can avoid liability on constitutional claims by meeting their burden of establishing that the plaintiff can show no ill consequence of the alleged deprivation." Pet. 12. First, *Price Waterhouse* did not involve a constitutional claim. Second, consistent with the plain language of Title VII, this Court held in *Price Waterhouse* that a substantive violation of the statute occurs only when consideration of an illegitimate criterion is the "but for" cause of an adverse employment action. Finally, that specific holding has been legislatively overturned (Pet. 13, n.1) and the legislative history of the Civil Rights Act of 1991 indicates that Congress intended to restore the law that applied prior to *Price Waterhouse* in cases such as *Bibbs v. Block*, which the House Report specifically cited. See H.R.Rep. No. 102-40(I) at 48, 1991 U.S.C.C.A.N. at 586.

The defendants further assert that because Title VI was enacted pursuant to the spending clause, Congress lacked the authority to abrogate the States' Eleventh Amendment immunity. Pet. 14. The issue is fully addressed by the Fifth Circuit's opinion (Pet. App. A2-A10) and the Brief for the United States In Opposition, and Lesage adopts by reference the arguments and authorities set forth therein.

CONCLUSION

Based on the foregoing, respondent-plaintiff Lesage respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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